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October 8, 2004

Andrew Weber, Clerk
Supreme Court of Texas
201 W. 14th Street, Rm. 104
Austin, Texas 78701

Via Federal Express and E-Mail
(andrew.weber@courts.state.tx.us)

Re: No. 04-0606; *In re: Silica Products Liability Litigation*; in the Judicial Panel on
Multi-District Litigation.

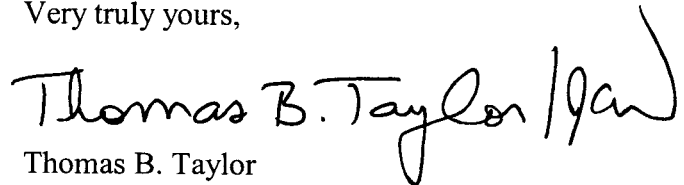
Dear Mr. Weber:

Enclosed for filing in the above-referenced matter is an original and one copy of the Hanson Aggregates, Inc. f/k/a Pioneer South Central, Inc. and/or Pioneer Concrete of Texas, Inc.'s Brief in Opposition to Parmelee Industries, Inc., et al.'s Rule 13 Motion to Transfer.

Please file the original with the Court and return a file-stamped copy of same to us in the enclosed, self-addressed and stamped envelope.

If you have any questions, please do not hesitate to call.

Very truly yours,


Thomas B. Taylor

TBT/dlb
Enclosures

cc: Mr. Bruce Steckler - Counsel for Plaintiffs
Mr. Steve Russell - Counsel for Defendants
Mr. Robert Thackston - Counsel for Movants

IN RE:)	
SILICA PRODUCTS)	JUDICIAL PANEL ON
LIABILITY LITIGATION)	MULTI-DISTRICT LITIGATION
)	

**HANSON AGGREGATES, INC. F/K/A PIONEER SOUTH CENTRAL, INC. AND/OR
PIONEER CONCRETE OF TEXAS, INC.'S BRIEF IN OPPOSITION TO PARMELEE
INDUSTRIES, INC., *ET AL.*'S
RULE 13 MOTION TO TRANSFER**

Without seeking the agreement or consultation of all parties, a paltry six Defendants are attempting to subvert a well established and efficiently operated court system by seeking to transfer to a single court all pre-trial handling of 58 Texas silica cases filed after September 1, 2003 alleging injury from silica containing materials ("silica cases"). The Motion falls far short of meeting the procedural requirements as set out in Rule 13 and in the interests of justice must be denied.

**I. Movants' "Factual Background" is Alarmist;
The Texas Court System *is* Effectively Managing Silica Litigation**

Texas courts and parties to silica suits, plaintiff and defense, are successfully working to resolve disputes and conduct litigation in a timely and efficient manner. The use of Master Discovery requests is accepted as standard practice and conducted without the need for court intervention. Depositions are regularly scheduled and convene without incident. The majority of silica cases do not reach trial, having been resolved through voluntary mediation or settlement discussions. The resolution of most silica suits occurs within less than two to three years, most often without extensive demands being placed on specific courts.

Six defendants (the Movants) are now attempting to undermine the solidly established silica

court framework by moving for a consolidation silica suits under Rule 13 based largely upon the alarmist notion that our Texas judicial system is about to collapse. However, the Movants provide no examples of inconsistent rulings, pretrial mismanagement or duplicative discovery that would be cured by transfer and consolidation. Instead, the Movants discuss a single example illustrating a war of wills between courts competing over the jurisdiction of a consolidated silica case. The Movants discuss the tug of war extensively, but fail to mention that it is the only such example in years of silica litigation and is being dealt with effectively by the higher courts within the existing system.

In light of the failure to provide any compelling demonstration for the need to change from our present efficient and fair system to one which is entirely unknown and untested, HANSON AGGREGATES, INC. F/K/A PIONEER SOUTH CENTRAL, INC. AND/OR PIONEER CONCRETE OF TEXAS, INC. must urge the Panel to deny the Movants' extreme demand for change through consolidation.

II. Discussion:
The Motion to Transfer Falls Short of Satisfying
Rule 13's Most Basic Mandatory Requirements

The Motion to Transfer fails to meet the mandatory requirements of Rule 13, and must be denied.

A Rule 13 Motion to Transfer “must”:

- (1) state the common question or questions of fact involved in the cases;
- (2) contain clear and concise explanation of the reason that transfer would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of the cases;
- (3) state whether all parties in those cases for which transfer is sought agree to the motion; and
- (4) contain an appendix that lists:

- (A) the cause number, style, and trial court of the related cases for which transfer is sought; and
- (B) all parties in those cases and the names, addresses, telephone numbers, fax numbers, and e-mail addresses of all counsel.

TEX. R. JUDIC. ADMIN. 13.3(a) (emphasis added). The Movants have not satisfied any of these *mandatory* elements. Therefore, the Panel must deny the Motion to Transfer.

A. The Motion Only Identifies Some Common Themes Or Issues, Failing to State “Common Questions of Fact” Better Resolved By Pre-Trial Consolidation

Individualized plaintiff fact issues are the driving force in silica cases. Four of the six Movants agreed when joining the motion to sever filed in *Villard Turbeville, et al. v. Pulmosan Safety Equipment, et al.*, Cause No. 02-0138; In the Circuit court of Humphreys County, Mississippi. Parmelee Industries, Inc., Eastern Safety Equipment Corporation, Empire Abrasives Equipment Corporation and Ingersoll-Rand Company argued in that multi-plaintiff silica case:

- “While each Plaintiff alleges that he or she suffered harm as a result of exposure to silica-containing products, individuals cannot be joined as plaintiffs merely because they assert a similar theory of recovery.” (Exhibit A at 4-5, ¶7).
- “...the occurrences in [a silica case] are individualized and unique - not related” (*Id.* at 5, ¶8).
- “...there is no commonality among these plaintiffs.” (*Id.*).
- “Even in the rare cases of overlapping employers, the Plaintiffs allege vastly different work histories, medical histories, exposure sites, and other factual information about how they were exposed to silica and what products they used while allegedly exposed.” (*Id.*).
- “...the viability of each Plaintiff’s claim depends upon highly individualized factual evidence.” (*Id.* at 7, ¶13).

The Movants argued the above in *Turbeville* in direct conflict with their claims in the present proceeding. Currently, they argue that the claims of the plaintiffs in the 58 silica suits at issue are all generic, or common - taking a diametrically opposed position - seeking what is most convenient for their present interests - not in the interests of justice. Such is an absolute abuse of our judicial system cloaked in the disguise of seeking judicial economy.

The burden of proof, for determining that fact issues do not predominate, or what concise questions of fact centralization will improve, or how centralization will improve handling of specific fact issues, belongs to the Movants. *See* TEX. R. JUDIC. ADMIN. 13.3(a)(1),(2). Presently, the Movants correctly identify only *themes* common to silica suits such as product exposure and medical causation. They ignore now what they argued in the past, the fact sensitive nature of silica suits and how a particular plaintiff's experience and condition predominates. The Movants have not identified *questions* of fact that can be dealt with more efficiently by centralizing pre-trial matters.

It is virtually impossible to show commonality of issues because of a large variance in the disease process, the claimants' exposures, knowledge in the industry at any given time period, alleged "linked" diseases that not all claimants suffer from, use of different types of respiratory protective equipment, individual employers' safety rules, other harmful exposures, etc., such as:

1. The disease process for each claimant varies and different latency periods apply depending on the level and duration of exposures, that is:
 - a. Acute Silicosis
 - b. Complicated Silicosis
 - c. Simple Silicosis
 - d. Silicatuberculosis
2. There are certain diseases that the plaintiffs' bar alleges are linked to silica exposure, but not all claimants have a "linked" diseases, such as:
 - a. Rheumatoid Arthritis

- b. Lung Cancer
 - c. Lupus
 - d. Renal disease
 - e. Scleroderma
- 3. Variations in work and exposure histories of the claimants
- 4. Environmental and other health factors vary from claimant to claimant, that is:
 - a. Some have asbestosis exposures
 - b. Some have other mixed dust exposures
 - c. Some are smokers
- 5. Uses of different types of respiratory protection, if any, such as:
 - a. No respiratory protection at all
 - b. Non-air fed hoods
 - c. Air fed hoods
 - d. Cartridge respirators of multiple different types and shapes
 - e. Dust masks from multiple different manufacturers with different protection ratings, etc.
- 6. The types of exposures are different, that is:
 - a. Bystander exposure
 - b. Some are sandblasters
 - c. Some are foundry workers
- 7. The knowledge in the industry varies from claimant to claimant depending on the years of exposures
 - a. Some have pre-OSHA exposures vs. post OSHA exposures
 - b. Changing OSHA rules and regulations
 - c. Safety equipment improved over time
- 8. Few of the estimated 6,000 claimants in the state of Texas worked for the same employers, and as such, the safety in the work place varied from employer to employer and from job site to job site
- 9. Warnings provided to the employers, workers and end users varied depending on whose products were involved during what time period
- 10. The changes in the state of the medical knowledge over time
- 11. An individuals personal health
- 12. Difference in opinion between B-read interpretations based upon
 - a. The B-readers reader's bias
 - b. The quality x-rays
- 13. Multiple different types of products involved, such as:
 - a. Abrasives
 - b. Respiratory protective equipment
 - c. Application Equipment
 - d. Compressors
- 14. Multiple different types of defendants involved, such as:

- a. Employers based upon intentional tort or gross negligence
- b. Premises owners
- c. Abrasive suppliers
- d. Respiratory protective equipment manufacturers
- e. Abrasive blasting application equipment manufacturers
- f. Compressor manufacturers
- g. Wholesalers and retailers

Because of the multitude of variables, there is a lack of commonality between claimants other than an allegation of “silicosis”. Each individual claimant’s case is unique and must be evaluated on an individual basis.

B. The Motion Lacks Clear and Concise Explanation of How Transfer Would Serve the Convenience of the Parties and Witnesses.

There is no evidence that the Movants’ requested transfer would serve the convenience of parties and witnesses in silica suits. The only claim that the Movants make is that in the past, the MDL Panel has determined that centralization of *asbestos* suits served the convenience of the parties and witnesses. *See* Motion to Transfer at 7. Rule 13 requires that the Movants offer a “clear and concise explanation” of how the requested transfer will serve the interests of parties and witnesses in *silica* cases. TEX. R. JUDIC. ADMIN. 13.3(a). There is no explanation and the Movants’ failure to comply with this mandatory element of a Motion to Transfer is fatal. *See* TEX. R. JUDIC. ADMIN. 13.3(a)(2).

C. The Motion Lacks Clear and Concise Explanation of How Transfer Would Promote the Just and Efficient Conduct of the Cases.

Movants *fail* to support their claim that MDL transfer will unburden trial courts and litigants and promote efficient litigation.

1. Movants' Use of In Re: U.S. Silica as an Example of "Inefficiency and Turmoil" is Unjustified and Misapplied.

As stated earlier, the overwhelming majority of silica cases are resolved efficiently and without extensive court intervention. The Movants limit their discussion of "inefficiency" and "turmoil" that may be alleviated by Rule 13 to the example of *In Re U.S. Silica*. Motion to Transfer at 2. *In Re U.S. Silica* resulted due to the forum shopping efforts of one law firm and is being properly dealt with by the Texas Supreme Court. There is no evidence to support the assertion that such problems will be repeatedly seen elsewhere in the state of Texas.

2. Movants Distort the Current State of Workplace Discovery.

Defendants are capable of, and have been successful in conducting discovery of work sites when they have chosen to do so. Large industrial work sites have been the target of considerable discovery, narrowing the scope of what is necessary to require over time. In particular, Tyler Pipe is a typical example of a work site that has been so well researched that discovery on training and conditions in the facility is no longer necessary. In contrast, Movants make the unfounded assertion that the pace of plaintiffs' depositions deprives plaintiffs and defendants of the opportunity to conduct proper discovery of work sites and industrial employers.

3. Product Identification Will Not be Determined "Once and For All" by Centralization.

Silica containing materials are used in multiple applications, each with its own level of exposure, respiratory protection, training, and controls. Plaintiffs working within thirty feet of one another may have very disparate exposures due to different job responsibilities and the levels of associated protection and knowledge, as well as differing memories. Product identification must be determined on a plaintiff by plaintiff basis. Movants incorrectly maintain that MDL transfer will

“once and for all” determine product identification for a large number of plaintiffs. Motion to Transfer, at 6.

Further, simple product identification alone does not create liability. See *Humble Sand & Gravel vs. Gomez*, 2004 WL 2090592, 47 Tex. Sup. Ct. J. 1214 (Tex. Sept. 17, 2004).

MDL may work for asbestosis litigation, but that may be because there are certain diseases that not related to any other exposure except asbestos, such as mesothelioma.

4. Movants Do Not Concisely Demonstrate That Centralized Handling is Needed; Nor Do They Explain How it Would Help.

Movants further claim, without explanation, that MDL centralization would increase efficiency because the pre-trial court could establish a document depository, settle pleading and align the parties, develop and enforce consistent discovery obligations and definitions for terms used in Master Discovery, determine admissibility of certain medical causation and other expert testimony under *Robinson* and *Havner*, determine the scope and availability of sophisticated user and learned intermediary defenses for large industrial worksites at issue in many cases, and determine the applicability of TEX. CIV. PRAC. & REM. CODE §82.001 *et seq* (statutory product liability). Movants have not offered any proof that these matters need a remedy or that there have been past inconsistencies; nor have Movants provided the required “clear and concise explanation” of how centralized handling of these matters would promote the just and efficient conduct of cases.

At the outset, HANSON AGGREGATES, INC. F/K/A PIONEER SOUTH CENTRAL, INC. AND/OR PIONEER CONCRETE OF TEXAS, INC. would note that a document depository is an unnecessary item without which silica litigation has functioned for more than twenty years. Its implementation would needlessly add more ongoing expenses for all concerned. Each of Movants’

remaining suggested efficiencies actually involves case-specific and fact-specific inquiries that are not improved by MDL centralization. For example, in the typical silicosis case, on *Havner* and *Robinson* issues, plaintiff-specific exposure and medical issues predominate. The issue of general causation - e.g., whether silica exposure can cause silicosis - is not typically raised. Although it is conceivable that a centralized court might once and for all exclude certain experts based upon lack of qualification, the typical and more important expert issues such as methodology, scientific basis, and validity of opinions on specific causation are fact-specific inquiries. Movants have given no explanation of any great need in Texas courts for centralization of such issues, nor have the Movants pointed to a plethora of differing results. Similarly, Movants' suggestion that sophisticated user/learned intermediary doctrines and statutory strict liability application will be better resolved in an MDL suffers from a similar failure to conceded that theses are either fact-reliant inquiries, matters for which no centralized decision making is needed, or both. Moreover, the sophisticated user and learned intermediary doctrines are presently involved in at least two cases that are being considered by the Texas Supreme Court, which may resolve the law on these issues. Once that is done, the lower courts will know the applicable rules to apply in particular cases, although specific factual inquiries could still drive the outcome (e.g., the specific intermediary's knowledge might exceed that of the industry). Movants have not shown that MDL centralization would help.

Similarly, Movants have failed to demonstrate that Master Discovery needs more consistency, or that an MDL consolidation would provide it. Currently the prevailing practice has been the use of Master Discovery requests, largely by agreement, and largely without dispute as to definitions or compliance. As a result, discovery disputes on Master Discovery are probably less

common in silica cases than in other litigation.

Absent some compelling demonstration that MDL transfer is necessary, the Panel should deny the Motion to Transfer. The current system is handling the complained-of issues just fine.

5. Movants' "Mature Tort" v. "Immature Tort" Analysis Ignores Rule 13's Requirements.

Movants' argument regarding "mature" versus "immature" torts is a red herring. Nothing in Rule 13 refers to maturity of torts, and the purpose of Rule 13 is not served by determining a global characterization of those cases as involving "mature" or "immature" torts.

The real issues are whether centralization would improve the handling of cases with common questions of fact, whether consolidation will be for the convenience of the parties and witnesses, and whether the transfer will promote the just and efficient conduct of the case. See TEX. R. JUDIC. ADMIN. 13.3(a).

As discussed at length above, there is certainly some minimal level of commonality in these cases, such as the disease of silicosis, but that commonality is at the level of general themes and issues. Many threshold issues, such as whether silica containing materials can scientifically cause silicosis are essentially "resolved," but resolution of each case requires a fact-specific inquiry of the levels of exposure, duration, and many other factors, followed by an application of the law to those facts. In other words, much of the basic framework of these cases has been resolved, and the determination of personalized factual variables drives the cases. Rule 13 focuses on whether centralization of pre-trial procedures would improve case handling. Movants have not demonstrated that it will.

Furthermore, to the extent that there may be new and evolving legal issues in these cases, Movants have not specifically identified them, nor have they made any showing why such as-yet-unnamed issues are better resolved by concentration in one court. To the extent that there are mature issues regarding discovery, an MDL is not appropriate and will simply cause unnecessary inefficiencies. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION 3d ¶ 33.21 n. 1020 at 311 (Federal Judicial Center 1995).

There is currently no crying need to transfer these cases to one court for pre-trial purposes. Movants have demonstrated no compelling need for centralization nor have they demonstrated any failure on the part of the current trial courts to handle these issues. There is no compelling reason to switch from the known and effective way of handling these matters to a different, unknown way of handling them. Because the Movants have not satisfied Rule 13 minimum requirements, the Panel must deny their Motion.

6. Movants' Melodramatic Representation Regarding Settlement is Untrue and Movants Have not Demonstrated Credible or Reasonably Anticipated Benefits of MDL Centralization.

Finally, Movants allege without citing examples, that “if silica cases are not consolidated...these and other issues will be repeatedly litigated with inconsistent results...[and that] the parties will have no clear sense of the value of claims given the ‘Russian roulette’ of pre-trial rulings.” To the contrary, the parties currently have a very good sense of the value of their cases due to the years of litigating them under the current framework. Part of the equation in any case is the uncertainty of appellate issues. Movants have not shown that silica cases are especially and harmfully affected by any such issues. In fact, it is simply not true that Texas courts are so

inconsistent in their legal rulings in silica cases that there is no way to predict the outcome of a case or to value a case for settlement purposes. If that were so, Movants would have provided concrete examples as required by Rule 13.

Furthermore, as noted above, consolidation into one court is no guarantee against reversal and no guarantee of clarification. In fact, if a centralized court's rulings were reversed, the potential fallout could be far reaching because of the number of cases that could be affected.

Because Movants fail to show or even allude to concrete examples of significant existing problems that would be better resolved by MDL consolidation, Movants have not satisfied the minimum requirements of Rule 13.3(a). Absent much more concrete identification and analysis of true problems, followed by well-reasoned analysis of how pre-trial consolidation would solve such problems, the Panel must resist the drastic, potentially costly, and uncharted measures Movants currently pursue.

D. The Motion Does Not Reflect the Position of All Parties.

Although HANSON AGGREGATES, INC. F/K/A PIONEER SOUTH CENTRAL, INC. AND/OR PIONEER CONCRETE OF TEXAS, INC. is a defendant in at least 38 of the 58 silica cases the Movants seek to transfer, Movants did not serve their motion on HANSON AGGREGATES, INC. F/K/A PIONEER SOUTH CENTRAL, INC. AND/OR PIONEER CONCRETE OF TEXAS, INC. Movants admit that they have contacted only some Plaintiffs attorneys and they say nothing about contacting other Defendants. Motion to Transfer, at 9. *Rule 13's plain language does not permit Movants to request the massive, broad-sweeping change they now seek without having the input of "all parties" involved. Id. At 13.3(a)(3).* Movants failed to

even contact most of “*the parties involved*”, much less have their input before filing their motion.

E. The Motion Does Not Contain a Sufficient Appendix.

The Appendix does not contain all of the information required by Rule 13.3(a)(4). Many Defendants phone numbers and e-mail addresses are lacking without explanation. Rule 13.3(a)(4)’s requirements are mandatory, and failure to comply is fatal.

F. From the Beginning, The Panel Must Enforce Rule 13 As Written.

Rule 13 is new and its potential effects are unknown. Accordingly, it is essential that the Panel strictly enforce the mandates of Rule 13 rather than entertaining six defendants’ corner-cutting efforts to make revolutionary case handling changes. The legislature made this point clear by its use of the word “must” when setting forth these requirements.

III. Objection to Movants’ Proffered Evidence

A party may file evidence with the MDL panel Clerk only with leave of the MDL Panel. TEX. R. JUDIC. ADMIN. 13.3(j). Here, Movants filed evidence without moving for leave. HANSON AGGREGATES, INC. F/K/A PIONEER SOUTH CENTRAL, INC. AND/OR PIONEER CONCRETE OF TEXAS, INC. objects to the evidence, ask that all of Movants’ evidence be stricken, and ask that the evidence not be considered for purposes of the Motion.

IV. Conclusion

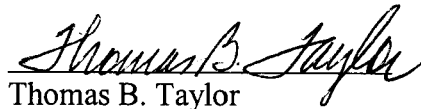
Rule 13 sets forth mandatory elements for a Motion to Transfer, and Movants have not satisfied any of them. Further, on a common sense level, Movants have demonstrated no compelling need for a consolidation of pre-trial matters. Currently, Texas courts are handling silica litigation efficiently, and Movants offer no good, concrete explanation for why cases that are now being

handled efficiently in various courts will be better handled by piling them into one court.

V. Prayer

Wherefore, premises considered, HANSON AGGREGATES, INC. F/K/A PIONEER SOUTH CENTRAL, INC. AND/OR PIONEER CONCRETE OF TEXAS, INC. requests that the Panel; sustain the objection to Movants' proffered evidence; strike Movants' proffered evidence, and refuse to consider the evidence in ruling upon the Motion to Transfer; and deny Parmelee Industries, Inc., *et al.*'s Motion to Transfer Pursuant to Rule 13. In addition, HANSON AGGREGATES, INC. F/K/A PIONEER SOUTH CENTRAL, INC. AND/OR PIONEER CONCRETE OF TEXAS, INC. requests any other and further relief to which they may show themselves to be entitled.

Respectfully submitted,



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**Attorneys for HANSON AGGREGATES,
INC. F/K/A PIONEER SOUTH CENTRAL,
INC. AND/OR PIONEER CONCRETE OF
TEXAS, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on all counsel of record (as represented by Movants) in the 58 cases that are the subject of the Rule 13 Motion to Transfer. Service was made by certified mail, return receipt requested in accordance with the Texas Rules of Civil Procedure.

Thomas B. Taylor

IN THE CIRCUIT COURT OF HUMPHREYS COUNTY, MISSISSIPPI

VILLARD TURBEVILLE, ET AL.

PLAINTIFFS

VS.

CIVIL ACTION NO. 02-0138

PULMOSAN SAFETY EQUIPMENT, ET AL.

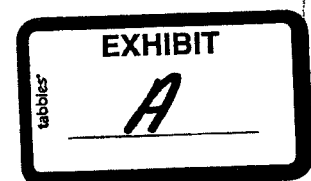
DEFENDANTS

**3M COMPANY'S RENEWED MOTION
TO SEVER PLAINTIFFS' CLAIMS AND TRANSFER VENUE**

Defendant 3M Company ("3M") respectfully renews its motion filed on or about February 11, 2003, to sever the claims made by each Plaintiff here and transfer venue as to all Plaintiffs not proper parties in this Court. Since 3M's initial motion, the Mississippi Supreme Court has amended Rule 20 of the Mississippi Rules of Civil Procedure and issued several opinions clarifying the law governing joinder of the claims of multiple plaintiffs against numerous defendants. In addition, the parties have conducted discovery that demonstrates that the Plaintiffs here are misjoined.

In light of these changes, this Court should sever the Plaintiffs' claims for all purposes and transfer the Plaintiffs not resident in Humphreys County to appropriate venues. In further support of its motion, 3M states as follows:

1. Rule 20 of the Mississippi Rules of Civil Procedure specifically provides that persons can join in a single action as plaintiffs only if their claims arise out of the same transaction, occurrence, or series of transactions or occurrences. *See* Miss. R. Civ. P. 20. On February 20, 2004, the Mississippi Supreme Court amended Rule 20 and the



accompanying Comment to the Rule. Among *other things*, the amendment requires plaintiffs, “as early as practicable,” to disclose “the factual basis for joinder” as to *all* plaintiffs. A copy of the February 20, 2004 Order amending the Rule and its comments, and the amended rules, are attached hereto as composite Exhibit “A.”

2. Since 3M filed its initial motion, the Mississippi Supreme Court also rendered its decisions in *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004) (*Janssen I*); *Janssen Pharmaceutica, Inc. v. Bailey*, 2002-CA-00736-SCT, 2004 WL 1066825 (Miss. May 13, 2004) (*Janssen II*); *Janssen Pharmaceutica, Inc. v. Grant*, 873 So. 2d 100 (Miss. 2004) (*Janssen III*); and *Janssen Pharmaceutica, Inc. v. Keys*, 2003-IA-00275-SCT, 2004 WL 1688522 (Miss. July 29, 2004) (*Janssen IV*).

3. In the *Janssen* cases, the Supreme Court analyzed joinder of multiple plaintiffs and defendants in the context of claims for injuries allegedly caused by the drug Propulsid. The Court’s reasoning in *Janssen I* is instructive **here**:

Each plaintiff has a **unique** medical history, and during the time frame involved in the 56 claims, there were five different warning inserts. ... The present case requires there to be a judgment of liability with respect to each of the 45 defendants, and this determination of liability will turn on, among other things, each plaintiff’s own distinct medical history, injuries and damages, the adequacy of the warning labels ..., as well as ... the question of whether each prescribing physician would have prescribed Propulsid even with an adequate warning. No jury can be expected to reach a fair result under these circumstances. ...

866 So. 2d at 1101. Based on the individual characteristics of the plaintiffs’ claims, the *Janssen I* Court concluded that joinder was improper because “no single transaction or occurrence or series of transactions or occurrences connect[ed] all 56 plaintiffs and 42 physician defendants.” *Id.* at 1102.

4. In similar fashion, the Supreme Court in *Janssen II* and *Janssen III* disapproved of the joinder of smaller numbers of individual parties because of the risk of jury confusion and the undue prejudice suffered by defendants facing liability for claims brought by several plaintiffs, sometimes against only unrelated defendants. In *Janssen II*, the Supreme Court reversed and remanded a jury verdict in favor of the plaintiffs in the first Propulsid trial in the nation—a trial that involved the consolidated claims of ten unrelated plaintiffs. 2004 WL 1066825, at *11. After setting forth the widely disparate circumstances of each plaintiffs claims, the Court held that “it was likely that the jury was biased against the defendant by one of those [multiple] plaintiffs. Therefore, a trial consisting of all ten plaintiffs with their unique medical histories and ten sets of witness testimony should have been, and is intolerable.” 2004 WL 1066825, at *13. Based on the record in *Janssen II* (and similar to the record adduced in this action), the Supreme Court concluded that “there can be little doubt that this method of presentation of evidence created unfair prejudice for the defendants by overwhelming the jury ..., thus creating a confusion of the issues.” *Id.*

5. In *Janssen IV*, the Supreme Court stressed the importance of balancing judicial economy and expediency gained by consolidation with the “paramount concern” for fairness. 2004 WL 1688522 at *1. The Court noted that “[t]here is an innate danger in asking jurors to assimilate vast amounts of information against a variety of defendants and then sort through that information to find what bits of it apply to which defendant.” *Id.* The Court went on to conclude that “the jury might well be overwhelmed with thirty-

seven separate fact patterns” and ordered the plaintiffs’ claims severed and transferred to appropriate venues. *Id.* at *2.

6. The revisions to Rule 20, further amplified by the Supreme Court in the *Janssen* decisions, make clear that severance is mandated in cases like this one in which multiple plaintiffs attempt to assert individualized personal injury claims against multiple, unrelated defendants. For example, in *Spencer v. Pulmosan Safety Equipment*, this Court ordered the plaintiffs’ silicosis claims severed and transferred to appropriate venues. *Spencer*, Civ. Action No. 02-0143, Agreed Order Granting Severance (Cir. Ct. of Humphreys County entered Jan. 12, 2004) (severing plaintiffs’ silicosis claims and transferring non-resident plaintiffs to appropriate venues), attached hereto as Exhibit “B”; see also *Sutton v. Pulmosan Safety Equipment*, No. 2002-0105, Order Granting Motion for Severance and Transferring Cases (Cir. Ct. of Bolivar County entered June 4, 2004), attached hereto as Exhibit “C.”¹ The instant action is substantively identical to the *Spencer* case, and the Court should reach the same result here as it did in *Spencer*.

7. As stated in 3M’s initial motion, neither the Plaintiffs’ Complaint nor any other information they have provided can support a “factual basis for joinder” of the Plaintiffs and their claims in this action, as required by Rule 20. In fact, there is no such basis. While each Plaintiff alleges that he or she suffered harm as a result of exposure to

¹ In an analogous context, the Circuit Court of Adams County, *sua sponte*, reconsidered and reversed its prior denial of a motion to sever the seven plaintiffs’ claims in an asbestos case in light of *Janssen II*. The court there found that “the opinion of the Mississippi Supreme Court regarding joinder under MRCP 20 sufficiently clarifies the previous Janssen opinion such that it is clear to this court that the motion for severance of the various plaintiffs should be granted.” See *Hall v. A.O. Smith*, 02-KV-0187-J, Order of Severance (Cir. Ct. of Adams County entered May 17, 2004), attached hereto as Exhibit “D.” Even though the plaintiffs’ claims arose from a common work site, the *Hall* court found that “each of the plaintiffs have a unique or individual evidentiary claim to alleged exposure and resulting injuries and damages.” *Id.* Unlike the *Hall* case, the plaintiffs in this case do not share a single, common work site; thus, the grounds for Severance are even more Compelling.

silica-containing products, individuals cannot be joined as plaintiffs merely because they assert a similar theory of recovery.

8. To the contrary, the occurrences in this case are individualized and unique—not related. Since 3M filed its initial motion to sever, a significant amount of discovery has been conducted by the parties. A review of that discovery confirms that there is no commonality among these Plaintiffs. For example, the Plaintiffs' discovery responses (vague and generalized as those responses are) disclose numerous different worksites around Mississippi and in many other states. Even in the rare cases of overlapping employers, the Plaintiffs allege vastly different work histories, medical histories, exposure sites, and other factual information about how they were exposed to silica and what products they used while allegedly exposed.

9. Based on the Plaintiffs' depositions and discovery responses, eleven of the twelve Plaintiffs do not disclose any information that Humphreys County is a place where they reside or where they were exposed to silica. Only Villard Turbeville, the "lead" plaintiff, alleges residence in Humphreys County, and even he does not offer proof of exposure at any place in Humphreys County. The rest apparently reside in four different counties in Mississippi.

10. The eighty-eight *Defendants* are likewise unrelated to each other. The Defendants either made or supplied silica products, manufactured industrial equipment that used silica, or, as with 3M, manufactured and sold respiratory protection equipment. But liability of particular Defendants to particular Plaintiffs cannot be sorted out by a jury in a massive, consolidated trial. Jury confusion and prejudice as to each of the Plaintiffs

and each of the Defendants is all but inevitable. *See Janssen II*, 2004 WL 1066825, at *13; *Janssen I*, 866 So. 2d at 1097-1101. The result would be manifest prejudice to 3M's constitutional right to a fair trial as to each Plaintiff's claims.

11. In light of the *Janssen* cases and the amendments to Rule 20, the claims of all the Plaintiffs in this action must be severed. Once severed, to the extent that any of the Plaintiffs (1) are nonresidents of the county in which this action is pending, and (2) cannot adduce evidence that their causes of action accrued here, their claims should be transferred to a county (or counties) in which venue is proper. *See* Miss. Code Ann. § 11-11-17. Section 11-11-11 of the Mississippi Code (1972) provides that "[a]ll civil actions for the recovery of damages brought against a nonresident ... in the state of Mississippi may be commenced in the county in which the action accrued or where the plaintiff then resides or is domiciled..."²

12. Venue is improper as to eleven of the twelve Plaintiffs because (1) they are not residents of the county where this action was filed, and (2) none allege exposure to silica in Humphreys County. Because venue for those eleven Plaintiffs is not proper in Humphreys County, the Court must, after severance, transfer those Plaintiffs' claims to the jurisdictions "in which each plaintiff could have brought his or her claims without reliance on another of the improperly joined plaintiffs." *See Janssen I*, 866 So. 2d at 1102. A chart setting forth the county of residence of all non-venue Plaintiffs (based


² Section 11-11-11 was repealed by Laws 2002, 3rd Extraordinary Session, and replaced with a new venue statute codified at Miss. Code Ann. § 11-11-3. Likewise, § 11-11-17 was amended by the special session of the 2002 Legislature. Because this action was filed prior to the effective date of the new § 11-11-3, the former venue provision in § 11-11-11, as well as the prior version of § 11-11-17, applies.

upon their discovery responses) is attached as Exhibit "E" to provide some direction to the Court as to where these Plaintiffs' claims should be transferred.

13. In sum, because the viability of each Plaintiff's claim depends upon highly individualized ~~factu~~l evidence, a trial involving the misjoined Plaintiffs and Defendants in this case would be contrary to the provisions of Rule 20, as amended and as recently applied by the Supreme Court in the *Janssen* decisions. This Court should sever each Plaintiff and require him or her to proceed separately against those particular Defendants whose products allegedly caused the alleged injuries at issue.

WHEREFORE, PREMISES CONSIDERED, Defendant 3M Company respectfully renews its initial motion to sever the Plaintiffs' claims and to transfer any Plaintiffs claims where venue is improper in Humphreys County. 3M respectfully requests such other relief as the Court deems proper.

RESPECTFULLY SUBMITTED, this the 9th day of August, 2004.


W. WAYNE DRINKWATER, JR. (MBN 6193)
MARGARET OERTLING CUPPLES (MBN 9656)
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CERTIFICATE OF SERVICE

I, Amanda K. Jones, one of the attorneys for Defendant 3M Company herein, do hereby certify that I have this day cause to be mailed, postage prepaid, a true and correct copy of the foregoing to:

Jamshyd M. Zadeh, Esq.
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Attorneys for Plaintiffs

and to all known Defense counsel of record by regular mail or email.

This the 9th day of August, 2004.


AMANDA K. JONES

IN THE CIRCUIT COURT OF HUMPHREYS COUNTY, MISSISSIPPI

VILLARD TURBEVILLE, ET. AL.

PLAINTIFFS

VERSUS

CIVIL ACTION NO.: 02-0138

PULMOSAN SAFETY EQUIPMENT, ET AL.

DEFENDANTS

**JOINDER IN AND ADOPTION OF 3M COMPANY'S RENEWED MOTION
TO SEVER PLAINTIFFS' CLAIMS AND TRANSFER VENUE**

COMES NOW, Defendants **Green Brothers Gravel Company, Inc. and Empire Abrasive Equipment Corporation**, and hereby join in and adopt 3M Company's Renewed Motion to Sever Plaintiffs' Claims and Transfer Venue filed on or about August 9, 2004, a copy of which is attached hereto as Exhibit "A".

THIS, the 9th day of August, 2004.

Respectfully Submitted,

GREEN BROTHERS GRAVEL COMPANY, INC.;
EMPIRE ABRASIVE EQUIPMENT
CORPORATION

BY:

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CERTIFICATE OF SERVICE

I, PATRICIA A. DICKE, of the law firm of PAGE, MANNINO, PERESICH & MCDERMOTT, P.L.L.C., do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the foregoing JOINDER IN AND ADAPTION OF 3M COMPANY'S RENEWED MOTION TO SEVER PLAINTIFFS' CLAIMS AND TRANSFER VENUE to Plaintiffs' counsel. All Defense counsel of record were served of this pleading by E-Service.

THIS, the 9th day of August, 2004.

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IN THE CIRCUIT COURT OF HUMPHREYS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

VILLARD TURBEVILLE, et al

PLAINTIFFS

vs

CIVIL ACTION NO.: 02-0138

PULMOSAN SAFETY EQUIPMENT, et al

DEFENDANTS

**JOINDER IN 3M COMPANY'S RENEWED
MOTION TO SEVER PLAINTIFFS' CLAIMS AND TRANSFER VENUE**

COME NOW Defendants Blue Ridge Sand and Gravel, Inc., Clark Sand Company, Inc., Clemco Industries Corp., Custom Aggregates and Grinding, Inc., DFM Equipment Company, Inc., Eastern Safety Equipment Corporation, Gulf Coast Marine Supply Co., Hanson Aggregates Central, Inc., Huey Stockstill, Inc., Ingersoll-Rand Company, Illinois Tool Works, Inc., successor by merger to Ransburg Corporation, successor by merger to DeVilbiss Industrial Products Corporation, successor to the Industrial/Commercial division of The DeVilbiss Company, Humble Sand & Gravel, Inc., Kelco Sales & Engineering, a division of Polley, Inc., Lockheed Martin Corporation, Moldex-Metric, Inc., Precision Packaging, Inc. f/k/a Quikrete Materials, Inc., and Southern Silica of Louisiana, Inc. (collectively "Defendants") and hereby respectfully join in and adopt, as if filed by Defendants, 3M's Renewed Motion to Sever Plaintiffs' Claims and Transfer Venue as if copied herein in extenso.

WHEREFORE, the Defendants respectfully join in and adopt the aforesaid pleading as if filed by them.

RESPECTFULLY SUBMITTED, this, the 18th day of August, 2004.

Respectfully submitted,



Edwin S. Gault, Jr., MSB No. 10187
Lisa R. Harris, MSB No. 10422

ATTORNEYS FOR DEFENDANTS



FILED

JANAKA J. JONES, CIRCUIT CLERK

AUG 19 2004

BY JWJ D.C.

IN THE CIRCUIT COURT OF HUMPHREYS COUNTY, MISSISSIPPI

VILLARD TURBEVILLE, ET AL.

PLAINTIFFS

VS.

CIVIL ACTION NO. 02-0138

PULMOSAN SAFETY EQUIPMENT, ET AL.

DEFENDANTS

**PARMELEE INDUSTRIES, INC.'s, JOINDER IN 3M COMPANY'S RENEWED
MOTION TO SEVER PLAINTIFFS' CLAIMS AND TRANSFER VENUE**

Defendant, Parmelee Industries, Inc., ("Parmelee"), without waiving any affirmative defenses or any other defenses, and reserving all rights, joins in and adopts 3M Company's Renewed Motion to Sever Plaintiffs' Claims and Transfer Venue.

WHEREFORE, Parmelee Industries, Inc., respectfully requests this Court to grant 3M Company's Renewed Motion to Sever Plaintiffs' Claims and Transfer Venue. Parmelee Industries, Inc., requests such other and further relief as the Court deems just and proper.

This the 9th day of August, 2004.

PARMELEE INDUSTRIES, INC., Defendant

BY: Kyle S. Moran

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FILED
TIMAKA J. JONES, CIRCUIT CLERK
AUG 12 2004

BY John D.C.

